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IN THE

Supreme Court of the United States

OCTOBER TERM 1963

No. 115

GENERAL MOTORS CORPORATION,
Appellant,
v.
STATE OF WASHINGTON, ET AL.,
Appellees

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

REPLY BRIEF FOR APPELLANT

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DIFFERENCES BETWEEN PARTIES

Brief of Appellees[1] reveals numerous differences between the parties, most of which are minor. In addition to the ultimate conclusion, the two major differences, or groups of differences, appear to be: the proper analysis of and emphasis upon facts; and the nature of the tax and its analogy to the taxes involved in prior decisions of this Court. We will deal with these two major issues with only passing reference to some of the minor points.

[1] For convenience, we adopt Appellees' device of citing Brief of Appellant as "GM Br." and will cite Brief of Appellees as "State Br."

COUNTERSTATEMENT OF CASE

Appellees puzzle us with their statement (State Br. 12) that "certain portions of the [Appellant's] statement [of the case] are misleading, if not actually inaccurate." What follows is a counterstatement which fails to specify any instance wherein General Motors' statement is "misleading" or "inaccurate". At most, it sets forth in detail additional facts which Appellees deem significant but which General Motors considers immaterial to the questions presented, and which may themselves be misleading unless great care is taken to sort out what General Motors is doing in Washington from what it is doing elsewhere and what others are doing.

It should be noted, for instance, that most of the activity involved in the "organization, development and maintenance of the General Motors retail dealer organization within the State of Washington" (State Br. 12) takes place outside that state. The zone managers who, with much help and supervision from offices in California and Michigan, are charged with this responsibility at the zone level are officed in Portland, Oregon, where they perform most of their personal functions and direct the activities of the personnel in and working out of the zone office (R. 14-18). The divisional Dealer Organization and Analysis Department, located in Michigan, does the staff work involved in selecting and locating dealerships (R. 176). The Chevrolet department head from Detroit testified:

> "• • • We, in our departmental activity are constantly reviewing the entire United States, in conjunction with our regional and zone managements, with respect to determining where Chevrolet dealers should be located. At the same time we work with our

> regional and zone management on behalf of our central office sales management, in reviewing all applications for the Chevrolet selling agreement, and whenever a Chevrolet applicant is recommended by zone management for a Chevrolet dealership, it is cleared through our departmental activity, on behalf of our central office sales management, before any agreements are executed with the applicant." (R. 176)

The dealer selling agreements with Washington dealers are executed outside the state (R. 48). The activities of the zone personnel recited at pages 15 through 20 of the State's Brief are in part performed outside the state and, inside or out, all relate directly to the fulfillment of such agreements, and as such are part of the interstate movement of goods to the Washington dealers. They were fairly summarized in our Statement as follows (GM Br. 8):

> "* * * Thereafter, the zone manager and his assistants advise the dealer in the management of his dealership and check his compliance with the Dealer Selling Agreement, particularly through the efforts of a 'district manager'."

This case involves only the activities and transactions of the Chevrolet, Oldsmobile, Pontiac and General Motors Parts Divisions. Those of Appellant's other divisions and subsidiaries are not at issue as Appellees imply (State Br. 21-22), and are wholly irrelevant. The trial court made the following finding of fact:

> "Plaintiff's Chevrolet, Pontiac, Oldsmobile and General Motors Parts Divisions operated substantially independently of each other and of other divisions and subsidiaries. The transactions of each division are in no way related to the transactions of any other division, and the transactions of the Port-

land warehouse of the General Motors Parts Division were in no way related to the transactions of the Seattle warehouse of that division." (R. 56)

The heading "In-State Aspects of the Actual Sale" (State Br. 22) could lead to a misunderstanding of the recital which follows. The parties stipulated that the ordering process was as follows:

"• • • Once a month he [the district manager] obtains from the dealer a projection of the dealer's requirements for automobiles for the next three months. He assists the dealer in making these estimates.

"Actual orders are thereafter sent by the dealer to the Zone Office, usually by mail, sometimes by telephone, and infrequently handed to the District Manager, who then mails or delivers them to the Zone Office.

"The orders are accepted (or rejected) at the Zone Office or at the factory, and if accepted are filled by shipment from the factory by common carrier, f.o.b. the factory. If the dealer has so arranged in advance with a finance company, shipments are made on straight bill of lading upon receipt of payment or acceptable credit from the finance company, which takes security title. Other shipments are made on bill of lading with sight draft attached." (R. 17-18)

The trial court made the following findings of fact:

"• • • Sales are made by plaintiff of automobiles and trucks and parts to dealers in this state pursuant to orders therefor by said dealers. Said automobiles and trucks and parts are manufactured outside of the State of Washington and shipped into this state. Activities conducted primarily outside the state include the • • • delivery of products, • • • the receipt, processing, recording, approving, accepting

and filling of orders, the billing and receipt of payment, the investigation, approval and execution of customer contracts (dealer franchises), the investigation and extension of credit, * * *" (R. 47-48)

* * * * *

"From the time of receipt and acceptance of an order to consummation by delivery of product and receipt of payment, every step on plaintiff's part in each of the types of transactions in dispute is performed at an office, warehouse or factory in some other state except such expediting of deliveries as herein found to have been done by the Seattle Branch Office with respect to Chevrolet Class A transactions. By reason of the nature of plaintiff's business, solicitation of orders is not a necessary or usual step in its sales procedures.'" (R. 54)

Appellees claim that "'securing orders' is the function of the local district manager," citing as sole support a general description of a district manager's duties as stated in a Pontiac job classification manual (State Br. 23). From the foregoing facts, as stipulated by the parties and found by the trial court, based upon testimony of district managers themselves as well as of their superiors, it is clear that the actual practice is otherwise and a district manager does not "secure orders" in any sense other than promoting the conditions which encourage orders. The trial court found with respect to the district managers: "They do not accept or fill orders or approve credit, receive payment or make delivery" (R. 55). The general description of the job classification manual must give way to actual facts found and stipulated.

We have inserted these remarks merely to emphasize that what is going on in the state is not intrastate business, nor so complicated and extensive interstate activities as to look like intrastate business, but a limited activity

of exclusively interstate character. We don't suppose that, for instance, it would make any difference if the district managers actually did "secure orders". *Nippert v. City of Richmond*, 327 U.S. 416.

NATURE OF THE TAX

Throughout its brief (State Br. 8, 27, 31, 35, 63, 69), the State accuses us of "mischaracterizing" the nature of the tax. We are frankly surprised that, after the years of argument in this case, there should appear to be any difference between us on this point; and we confess we are unable to follow the State's argument.

Our technical statement of the nature of the tax is contained in the "Questions Presented". The State does not quote these, but quotes fragments from our "Summary" and "Argument". We called it a:

> "• • • tax on the privilege of engaging in the business of making sales at wholesale within said state, and which is measured by unapportioned gross receipts • • •" (GM Br. 2, 4); and a
>
> "• • • tax measured by unapportioned gross receipts which is laid on both the privilege of manufacturing and the privilege of selling • • •" (GM Br. 3)

We thought that quite accurately paraphased the statute (GM Br. 2a):

> "82.04.220 *Business and occupation tax imposed.* • • • there is hereby levied and there shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales • • •

"82.04.240 *Tax on manufacturers.* • • • Upon every person engaging within this state in business as a manufacturer • • •

"82.04.270 *Tax on wholesalers.* • • • Upon every person • • • engaging within this state in the business of making sales at wholesale; as to such persons the amount of tax with respect to such business shall be equal to the gross proceeds of sales of such business multiplied by the rate • • •"

The Supreme Court of Washington said in its opinion herein (R. 447):

"• • • The business and occupations tax statute, RCW 82.04.220, imposes a tax on the privilege of engaging in business activities."

and (R. 453):

"The tax is imposed upon business activity within the state. The measure of the tax is the proceeds from sales attributable to that activity. No part of the tax is attributed to manufacturing or other activities taking place outside of the state."

The State seemingly urges a distinction between "a tax on the privilege of engaging in business activities", as in the first quotation above from the state court's opinion, and a "tax • • • imposed upon business activity", as in the second quotation, and quotes the second but not the first (State Br. 31-37). We cannot find such a distinction, except, perhaps, in semantics beyond our reach, and it is quite apparent from the juxtaposition of the two quotations that the state court did not find it either.

As we pointed out in our Brief (GM Br. 17-18), there are distinctions among types of taxes from which real differences flow and which must be kept in mind in examining this Court's precedents in state tax questions. These

distinctions are within each of the following numbered groups:

1. (a) net income taxes; (b) sales and use taxes; (c) franchise taxes measured by unapportioned gross receipts.
2. (a) apportioned net income taxes; (b) franchise taxes measured by apportioned net income.
3. (a) sales taxes; (b) use taxes.
4. (a) apportioned gross receipts taxes; (b) unapportioned gross receipts taxes.

The distinctions within the first group we think are of primary importance in this case, the others only secondary. We think that Washington's tax comes within the class of "franchise[2] taxes measured by unapportioned gross receipts", to be separated carefully from net income taxes and sales and use taxes. We are sure it is not a net income tax, we agree with the State that it is not a sales tax (State Br. 33, 39, 63), and we think our arguments have been consistent with both those distinctions. The State, however, seeks support in an economic argument applicable only to taxes the burden of which is borne by the purchaser (i.e., sales and use taxes) in urging (State Br. 42, 43) that the "state of the market" should be allowed to tax interstate transactions "to equalize competitive conditions".

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[2] We do not understand that the State finds any difference between "franchise" and "privilege" and we use the terms interchangeably as we believe is generally done (e.g., Hartman, "State Taxation of Interstate Commerce", pp. 61, *et seq.*), except in certain unusual situations in which "franchises" are treated as a species of property. In *Northwestern States Portland Cement Co. v. Minnesota—Williams v. Stockham Valves & Fittings, Inc.*, 358 U.S. 450, at 458, this Court cited *Spector Motor Service Inc. v. O'Connor*, 340 U.S. 602, for the proposition that: "Moreover, it is beyond dispute that a State may not lay a tax on the 'privilege' of engaging in interstate commerce."

The State quarrels (State Br. 31, 35, *et seq.*) with our conclusion (GM Br. 38) that:

> "Under these circumstances the effect of the decision below is to sustain an unapportioned gross receipts tax imposed directly and solely on the privilege of engaging in exclusively interstate commerce or on extrastate commerce having minimal in-state aspects • • •"

The "circumstances" alluded to are briefly stated (GM Br. 37, 38) immediately preceding that conclusion, and are essentially that the activities within the state are solely in furtherance of out-of-state manufacture and sale of products followed by interstate shipment.

We can think of no conceivable way in which the in-state activities can be anything other than an integral part of the interstate (or extrastate) commerce itself. Neither the court in its opinion nor the State in its brief points to a single element which has any intrastate flavor.

The quotation from the court's opinion, upon which the State now relies (State Br. 37), points up an important gap in their thinking (R. 447-48):

> "• • • These activities provide an incident upon which the taxing statute operates."

Nowhere is any attempt made to reconcile that statement with the constitutional principle carefully enunciated by this Court in *Nippert v. City of Richmond*, 327 U.S. 416, and quoted in our Brief at p. 43: states cannot lay taxes on "incidents" which are integral parts of interstate commerce.

If "these activities" are an integral part of the interstate commerce (as we have all along asserted and as the state supreme court apparently assumes (R. 451)), and if the tax

is for "the privilege of engaging in" them (as the state supreme court said it is), or "upon" the activities themselves (as the State now argues), it is most assuredly "imposed directly and solely on the privilege of engaging in exclusively interstate commerce", as we said, or directly upon the interstate commerce itself—and it matters not which. No one doubts that mathematically the tax is a function of unapportioned gross receipts. A tax on unapportioned gross receipts from interstate commerce, or a tax for the privilege of engaging in interstate commerce or "on" activities integral with interstate commerce, and measured by unapportioned gross receipts therefrom, however described, is invalid, *Freeman v. Hewit*, 329 U.S. 249, *Spector Motor Service Inc. v. O'Connor*, 340 U.S. 602 and *Nippert v. City of Richmond*, 327 U.S. 416.

The State's argument (State Br. 35-37) that the differences in result between *Spector Motor Service Inc. v. O'Connor*, 340 U.S. 602, on the one hand, and *Norton Company v. Department of Revenue*, 340 U.S. 534, and *B. F. Goodrich Co. v. State*, 38 Wn.2d 663, 231 P.2d 325, cert. den. 342 U.S. 876, on the other, were rooted in differences in the types of taxes involved is poorly contrived. In each case the tax was for the privilege of engaging in business and measured by gross receipts. The differences were factual, not conceptual; and the primary difference was that both Norton and Goodrich were carrying on intrastate business within the taxing state whereas Spector was not. *Norton* and *Goodrich* are both fully in accord with *Spector* in holding that a privilege tax may not be measured by proceeds of transactions having no connection with an intrastate operation.

First Question—Interstate Commerce

The State relies heavily on *Field Enterprises, Inc. v. State of Washington*, 47 Wn.2d 852, 289 P.2d 1010, affd. per curiam 352 U.S. 806, citing it no less than nineteen times. The case is inapposite. The *Field Enterprises'* transactions all were processed through a substantial office in the state, which this Court evidently concluded was doing intrastate business. *Field Enterprises* has no bearing on the taxability of the items here disputed.

The State accuses us (State Br. 43) of wanting the Court to overrule *Norton Company v. Department of Revenue*, 340 U.S. 534. Nothing could be further from our minds, and, indeed, we have relied more heavily on that case than any other. The State apparently doesn't keep in mind what *Norton* decided and what it didn't. What it did decide was that incoming interstate sales, which had no contact with a local intrastate store other than the advisory services of engineers working out of that store, could not be subjected to a gross receipts tax. It did not decide that anything was taxable, but as to other classes of transactions, which utilized the facilities of the local store, it held that the interstate was so intermingled with the intrastate that it was "permissible judgment" for the Illinois court to apply the tax to the whole.

General Motors pays without dispute taxes on all transactions which can be assimilated to any of the transactions in *Norton* as to which this Court did not disturb the Illinois court's judgment (transactions utilizing facilities of related intrastate store). We think that the Washington court, far from trying to follow *Norton* as asserted by the State (State Br. 41), was trying in every way to avoid it. This was presaged by that court's stiff bow to *Norton* in its opinion in *B. F. Goodrich Co. v. State of Washington*, 38

Wn.2d 663, 231 P.2d 321) discussed in our Brief (GM Br. 21-22, 52-54).

It is not easy to analyze this Court's decision in *Field Enterprises*, since it was a *per curiam* affirmance without opinion except the citation of *Norton*. However, since this Court in *Norton* declined to interfere with the Illinois court's conclusion that transactions passing through an admittedly taxable local store could be included in the measure of tax on that store's intrastate business, it appears that the extensive office which Field Enterprises maintained in Washington must have been viewed as an intrastate business. If that be correct, the decision obviously has no relevance to the present case.

The concept that a tax *paid by the consumer* should be paid to the consumer's state is economically sound for reasons suggested by Mr. Justice Rutledge and quoted or mentioned by both parties hereto (GM Br. 23; State Br. 42). But the State overlooks the fact that the quotations referred *only* to taxes paid by the consumer (sales and use taxes, including the Indiana Gross Income Tax which is specifically passed on and in this respect is a sales tax). Application of the argument to *our* situation carries it own refutation. "Equalizing competitive conditions" (State Br. 42-43) is achieved by giving the tax to the consumer's state only if the consumer pays it. If, as in this case, the tax, incurred because of customers in Washington, is not paid by those customers but is passed on as part of overhead to customers generally, Michigan and California customers are required to pay some of Washington's tax, although there is no activity in that state which contributes to their purchase.

The example suggested by the State serves well to point up another distinction—still based on who pays the tax—

which the State misses. At State Br. 39, it is said that the property taxes which General Motors pays with respect to its factories in Michigan and California are passed on to customers generally. That is true, and rightly so because the customer in, for example, Washington is paying that part of the cost of production of his automobile which represents governmental services to the factories which produced it. There is no analogy which justifies charging a Michigan customer for a tax paid to Washington on receipts from Washington customers when the Washington activities, and hence governmental services, contribute nothing whatsoever to the Michigan automobile.

The State asserts (State Br. 33) that the "proceeds from transactions" are used to measure the tax "only when they are derived from in-state buyers and are attributable to the in-state activity being taxed". The market state concept creeps in in the reference to "in-state buyers". What have they to do with it, since the tax is supposed to be on *activities*, not customers? In only an extremely loose and tenuous sense are these receipts "attributable" to in-state activity—only in the sense that they are attributable to a great mass of activities (and merchandise), including a relatively infinitesimal activity in Washington. They are far less "attributable" to that in-state activity than they are to the sales activities taking place in Oregon, California and Michigan, to the manufacturing activities in various states other than Washington, and to many other activities, all outside Washington.

Appellees argue (State Br. 44-46) that *Norton Company v. Department of Revenue*, 340 U.S. 534, and *Field Enterprises, Inc. v. State of Washington*, 352 U.S. 806, overrule *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434, if not in result, at least in their rationale that no state may lay a direct unapportioned tax on gross receipts derived

from interstate commerce—and presumably overrule also the other cases cited in our argument (GM Br. 39-40). But *Norton*, and presumably also *Field Enterprises*, since the only stated reason for its affirmance was *Norton*, involved taxes imposed upon *intrastate* business, and hence do not disturb the holdings in *Gwin, White & Prince* and the other cases (pp. 11-12, *supra*). The business which Washington is here trying to tax is, like *Gwin, White & Prince*, like *Nippert v. City of Richmond*, 327 U.S. 416 (applying the same rule to states of destination) and like several others referred to in our Brief, *exclusively interstate*.

Appellees State quite correctly say (State Br. 47-49) that there would be no "multiple burden" in allowing the state of destination to tax gross receipts of interstate sales if the state of origin (and, necessarily, intervening states) were foreclosed from imposing any tax, apportioned or otherwise. The argument assumes, however, that this Court is willing to abandon the long-established constitutional doctrines that no state may either tax the privilege of engaging in interstate commerce nor directly tax the unapportioned gross receipts of such commerce (GM Br. 34-42; pp. 6-10, *supra*); and futher that this Court will now find invalid the many apportioned franchise taxes now levied by states of origin, including those paid by General Motors measured by computed portions of the income of its entire business, including that derived from its sales to Washington customers.

The State says (State Br. 47) it "disagrees completely" with the idea that no state—of origin or destination, or in between—should be allowed to tax the privilege of engaging in interstate commerce and measuring the tax by the proceeds thereof. In doing so it disagrees not only with us but with this Court, which for very sound reasons has consistently held that, absent permission from Congress, *no*

state may impose this type of tax on exclusively interstate commerce. Although the state of origin was involved in both *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434, and *Freeman v. Hewit*, 329 U.S. 249, the careful reasoning in each does not depend upon that fact but applies with equal force to the state of destination. Thus, in *Gwin, White & Prince*, Mr. Justice Stone said, at p. 441:

> "For more than a century • • • it has been recognized that under the commerce clause, Congress not acting, some protection is afforded to interstate commerce against state taxation of the privilege of engaging in it. [Citations omitted.] For half a century • • • it has not been doubted that state taxation of local participation in interstate commerce, measured by the entire volume of the commerce, is likewise foreclosed."

Freeman v. Hewit is to the same effect, and the rule was noticed with strong approval in the latest case to consider related matters, *Northwestern States Portland Cement Co. v. Minnesota—Williams v. Stockham Valves & Fittings, Inc.*, 358 U.S. 450, in which the holding of *Spector Motor Service Inc. v. O'Connor*, 340 U.S. 602, was expressly reaffirmed. The interstate commerce in *Spector* went both into and out of the taxing state—Connecticut was both the state of origin as to some transactions and the state of destination as to others.

This of course does not mean that interstate commerce does not pay its way. It does pay, in many ways, mentioned in our Brief (GM Br. 33). This Court has so recognized in both *Gwin, White & Prince* and in *Freeman v. Hewit*. It did not say that interstate commerce would be paying its way because it could be taxed by the state of destination. Instead it said the states could use other types of taxes: in *Gwin, White & Prince*, 305 U.S. 434, at p. 441:

> "• • • There has been left to the states wide scope for taxation of those engaged in interstate commerce, extending to the instruments of that commerce, to net income derived from it, and to other forms of taxation not destructive of it."

The same point was made by Mr. Justice Frankfurter in *Freeman v. Hewit*, 329 U.S. 249, at p. 253:

> "• • • To deny a State a particular source of income because it taxes the very process of interstate commerce does not impose a crippling limitation on a State's ability to carry on its local function."

and at p. 255:

> "• • • Thus, it can tax local manufacture even if the products are destined for other States • • • It can impose license taxes on domestic and foreign corporations who would do business in the state • • •, though it cannot, even under the guise of such excises, 'hamper' interstate commerce • • • It can tax the privilege of residence in the State and measure the privilege by net income, including that derived from interstate commerce."

The State seemingly disagrees with our statement that General Motors engaged in no intrastate commerce and no realistically separable local business (State Br. 51-52), but does not point to a single act that is not part of the exclusively interstate business. The sales promotion work, since it is exclusively in furtherance of interstate (or extrastate) sales, is pure interstate commerce. We don't know what bearing the "extreme degree of control" that General Motors is said to have over its dealers has on the question, but if there is any such, and if it has any bearing, it should be kept in mind that most of the activity so characterized occurs outside Washington.

The State misuses *West Publishing Company v. McColgan*, 328 U.S. 823 (State Br. 53). The Justices were not in agreement as to whether the use of office space was a controlling factor, but it was a case of a tax on *apportioned net income*, and no authority at all to the contrary of the *Norton* rule (enunciated five years later) that *unapportioned gross receipts* cannot be taxed unless related to a local store carrying on an intrastate business.

Second Question—Interstate Commerce

The State erroneously argues (State Br. 57-58) that our argument on this point would invalidate the Washington tax on wholesaling even if there were no Washington tax on manufacturing. It would not. To withstand a charge of discriminating against interstate commerce, a state's tax must (though this alone will not save it) be such that if enacted by every state it would not (at least not significantly) bear more heavily upon interstate commerce than intrastate. Measured by that standard, Illinois' retail occupation tax is sound: goods manufactured in Iowa and sold in Illinois would pay one tax to Illinois, and vice versa; and so would goods both manufactured and sold in either state. But if every state were to adopt Washington's tax, goods manufactured and sold in Washington (or in any other state) would pay only one tax, while goods manufactured in Washington and sold in any other state, or vice versa, would pay two taxes. Quite a difference.

We recognize the difference between the situation here and that in *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, and do not rely on that case for the purpose

suggested at State Br. 59, but merely for its guidance in finding the proper comparison to use in testing for discriminatory double taxation. *Halliburton* teaches that the total activities of the out-of-state manufacturer-user (manufacturing out of state, using in-state) must be compared with the total activities of an in-state manufacturer-user (manufacturing in-state, using in-state), and not just with an in-state user (purchasing and using in-state). Here, the State may not, as the Washington supreme court did (R. 451-53), compare only the selling activities of the two manufacturers, but must instead compare the sum of manufacturing-wholesaling activities within and without the state with the sum of such activities within the state, since the structure of the statute establishes a relationship between manufacturing and wholesaling.

Further, *Halliburton* does demonstrate that if a state's taxing scheme (such as Washington's) encourages an out-of-state manufacturer to become a resident manufacturer in order to compete on equal terms, then the tax structure is discriminatory against interstate commerce in the constitutional sense. The Court reasoned, 373 U.S. 64, 72:

> "• • • • If Louisiana were the only State to impose an additional tax burden for such out-of-state operations, the disparate treatment would be an incentive to locate within Louisiana; it would tend 'to neutralize advantages belonging to the place of origin.' *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511, 527, 79 L.ed. 1032, 1040, 55 S.Ct. 497, 101 A.L.R. 55. Disapproval of such a result is implicit in all cases dealing with tax discrimination since a tax which 'discriminates in favor of the local merchant,' *Nippert v. Richmond*, 327 U.S. 416, 90 L.ed. 760, 66 S.Ct. 586, *supra*, also encourages an out-of-state operator to become a resident in order to compete on equal terms. If similar unequal tax structures were

> adopted in other States, a not unlikely result of affirming here, the effects would be more widespread. The economic advantages of a single assembly plant for the appellant's multistate activities would be decreased for units sent to every State other than the State of residence. At best, this would encourage the appellant to locate his assembly operations in the State of largest use for the units. At worst, it would encourage their actual fractionalization or discontinuance. Clearly, approval of the Louisiana use tax in this case would 'invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause.' *Dean Milk Co. v. Madison*, 340 U.S. 349, 356, 95 L.ed. 329, 334, 71 S.Ct. 295."

The Washington tax structure, excusing as it does the application of the manufacturing tax where an item of commerce is both manufactured and sold there, must fall under the precise reasoning stated above in *Halliburton*.

Third Question—Due Process

The State meets neither of our points on due process. The first is that the tax is laid upon the business of making wholesale sales, and when such sales are made entirely without the state, we find the state reaching beyond its territorial jurisdiction to tax them, notwithstanding the presence of minor in-state activities related to such sales which the Washington court says are incidents supporting the tax (GM Br. 61-63, 66-68).

The second is that a tax, valid in other respects, is invalid if its measure is grossly disproportionate to its subject (GM Br. 63-66). The Washington supreme court, apparently recognizing that it cannot tax the extra-state sales

themselves, lays the tax on the related in-state "incidents", and finds nothing wrong with measuring that tax by the proceeds of the sales themselves—a measure which, since it is the same as if the entire business, not only of selling but also manufacturing, were strictly local, is necessarily grossly disproportionate to the actual in-state activities. Due process can just as well be violated by an excessive measure as by an extraterritorial application. *Hans Rees' Sons, Inc. v. North Carolina*, 283 U.S. 123 (GM Br. 63-64, 69).

The State, however, complains (State Br. 31) about the assertion in the Summary portion of our brief (GM Br. 16) that because this tax is by its terms laid on the privilege or activity of wholesale selling, and all the taxed sales were made without the state, due process was violated by taxing privileges granted by or activities conducted in other states.

Before the state courts we argued, and the *trial* court found (R. 61), that the statute did not purport to tax such activities as General Motors conducted within the state, and that General Motors' activities of the type which the statute did undertake to tax were not within the state. Our argument was that no claim was made that the statute imposed any tax on General Motors except in the wholesaling category: "engaging within this state in the business of making sales at wholesale" (RCW 82.04.270, GM Br. 2a); and that since all sales were made without the state, the statute had no application.

The State Supreme Court quickly disposed of that (R. 447-48):

> "* * * General Motors accomplishes wholesale sales of its products to retail dealers within this state.[3] Part

[3] We feel sure the court meant the phrase "within this state" to modify "dealers" and not "accomplishes".

> of the activities involved in these wholesale sales take place elsewhere; e.g., orders are filled, delivery made, and payment is received outside the state.[4] Nonetheless, business activities having a relation to wholesale sales are conducted in Washington. These activities provide an incident upon which the taxing statute operates. Whether or not these activities are sufficiently related to the accomplishment of wholesale sales to base the tax on the gross receipts of all wholesale sales to Washington retail dealers is a question with constitutional law ramifications in relation to the *measurement* of the tax and not the *imposition* of the tax. On the facts indicated, we hold that there is a statutory basis for imposing the tax." (Emphasis in original.)

The state supreme court thus reads "engaging within this state in the business of making sales at wholesale" to include "engaging within this state in business activities having a relation to wholesale sales made elsewhere". If that construction seems strained, it is nevertheless controlling as to the meaning of the statute. Even if the state court were successful in this attempt to satisfy due process by pinning the tax, not on the extraterritorial activity of selling, but on the related activities within the jurisdiction, it could do so only at the expense of ruining the argument, strongly urged by the State (State Br. 47-49), that there is no danger of multiple burdens in a tax on wholesaling, because only one state can tax that activity, even though some other state might tax manufacturing and use the same gross receipts as a measure. If Washington, having a mere relation to the wholesale sales, can impose such a tax so can

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[4] The court might have elaborated this to include the entire fact as found by the trial court (R. 54):

"XX. From the time of receipt and acceptance of an order to consummation by delivery of product and receipt of payment, every step on plaintiff's part in each of the types of transactions in dispute is performed at an office, warehouse or factory in some other state except such expediting of deliveries as herein found to have been done by the Seattle Branch Office with respect to Chevrolet Class A transactions. By reason of the nature of plaintiff's business, solicitation of orders is not a necessary or usual step in its sales procedures."

any other state, and if every state in which there is some activity having a relation to the wholesale sales can tax the gross proceeds thereof, it is difficult to see any escape from multiple burdens except to confine all activity to a single state.

Furthermore, we believe that the attempted avoidance of extraterritoriality is unsuccessful. It is too close to the attempt of the Virginia court in *Railway Express Agency, Inc. v. Virginia*, 347 U.S. 359, to escape the prohibition against state taxes on the privilege of engaging in interstate commerce by characterizing that state's license tax as a property tax.[5] The measure of the tax (gross receipts) was its undoing. The tax, urged as taxing the intangible going concern value of physical properties within the state, amounted to half the physical value of such properties, and indicated a base of a hundred times that physical value. Of this, this Court said (p. 366):

> "This may not overtax the express company, but it does overtax our credulity * * *"

It is equally incredible that a tax assertedly imposed upon minimal in-state activities related to wholesale sales made elsewhere, and measured by the entire proceeds of those sales, is not in principal part levied on the wholesale selling itself, as the statute says.

The extreme to which the Washington court strains in trying to find something taxable here—in support of its implied thesis that tax should be paid because of the presence of customers—is illustrated by the significance which

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[5] Virginia, by amending its statute so as to impose an intangible property tax measured by *apportioned* gross receipts, expressly in lieu of other property taxes, later met constitutional requirements. *Railway Express Agency, Inc. v. Virginia*, 358 U.S. 434.

it attaches to advertising. It recognizes that advertising activity is all carried on elsewhere, but wants General Motors to pay a tax because the media (magazines, newspapers, television) operate in Washington and are seen by Washington customers. (R. 440, 450) This stretches state jurisdiction far beyond the permissible limits specified in *Miller Brothers Co. v. Maryland*, 347 U.S. 340, in which not only customers plus advertising, but actual delivery in the vendor's own trucks, were held insufficient to supply the "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax" which "due process requires" even to permit the state to impose responsibility for collecting, for a fee, a *use* tax imposed upon its customers. Responsibility for collection rests upon much thinner jurisdiction than that required to support liability for a franchise tax not chargeable to the customer. *General Trading Co. v. State Tax Commission*, 322 U.S. 335; *Scripto, Inc. v. Carson*, 362 U.S. 207.

Under P.L. 86-272 (73 Stat. 555, 15 U.S.C. §381-4) (GM Br. 7a-9a) enacted by Congress in 1959, no state may impose a tax on or measured by *apportioned net income* on account of such activities as those of General Motors in this case, absent a local office, etc. *A fortiori*, the principle and policy of that Act frown upon a tax measured by unapportioned gross receipts. The Act has, of course, no direct application, because it did not take effect until long after the close of the period here in litigation, and because it does not in terms mention this type of tax. Nevertheless, it is strongly persuasive as an indication of what Congress thinks the rule should be in these circumstances.

CONCLUSION

The State has raised no points requiring qualification of the conclusion stated in our main brief (GM Br. 68-70).

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